UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MV PUBLIC TRANSPORTATION, INC.
Employer[1]

and

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO
Petitioner — Case No. 29-RC-11781

and

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Party to the Contract

MV PUBLIC TRANSPORTATION
Employer

and

UNION EMPLOYEES OF MV PUBLIC TRANSPORTATION, INC.
Petitioner — Case No. 29-RD-1137

and

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Party to the Contract

DECISION AND DIRECTION OF ELECTION

MV Public Transportation, Inc. ("the Employer") is engaged in providing paratransit services in multiple locations. As described in more detail below, the Employer voluntarily recognized Local 707, International Brotherhood of Teamsters

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1 The Employer's name appears as amended at the hearing.

("Local 707" or "Party to the Contract") in September 2008, as the collective bargaining representative of its drivers employed in Staten Island, New York. Under the provisions of Dana Corp., 351 NLRB 434 (2007), Local 707 filed a petition in Case No. 29-VR-13 in Region 29 of the National Labor Relations Board ("the Board") requesting notices informing employees of the circumstances and their rights under the National Labor Relations Act ("the Act"). Thereafter, Region 29 sent notices in October 2008, in order to notify drivers of the voluntary recognition and give them 45 days to seek an election if they so choose. The facts are disputed as to whether the Dana notice was actually posted. In any event, there is no dispute that on or about December 12, 2008, the Employer and Local 707 entered into a collective bargaining agreement covering a unit of drivers *and other classifications*, including mechanics and utility workers.

On various dates in 2009, unfair labor practice charges were filed against both the Employer and Local 707. On July 14, 2009, Local 1181, Amalgamated Transit Union, AFL-CIO ("Local 1181" or "RC Petitioner") filed a petition under Section 9(c) of the Act in Case No. 29-RC-11781, seeking to represent the same unit of employees hired by the Employer for the Staten Island contract. On October 9, 2009, driver John Russell ("Russell") filed a decertification petition in Case No. 29-RD-1137 under the name of "Union Employees of MV Public Transportation" ("RD Petitioner").[2] Pursuant to Board policy, Local 1181's petition and the decertification petition were both initially "blocked" pending resolution of the unfair labor practice cases.

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2 There is no contention that "Union Employees of MV Public Transportation" is a labor organization as defined in Section 2(5) of the Act.

On September 30, 2009, the undersigned Regional Director issued a Consolidated Complaint in Case Nos. 29-CA-29530 *et al.* alleging, *inter alia*, that the Employer prematurely recognized Local 707 as employees' bargaining representative in September 2008, when the Employer did not yet employ a representative segment of its ultimate employee complement, and was not yet engaged in its normal operations in Staten Island, in violation of Section 8(a)(2) of the Act. The Consolidated Complaint also alleges, *inter alia*, that Local 707 violated the Act by accepting such recognition. A hearing in the unfair labor practices cases closed, and those cases are currently pending before an administrative law judge.

On January 28, 2010, the undersigned issued an Order consolidating the instant representation cases, and scheduling a hearing. By letter dated February 5, 2010, the Employer moved to dismiss the petitions (or at least hold them in abeyance), arguing that the petitions cannot proceed while "blocking" unfair labor practice cases are still pending and unresolved.[3] By letter dated February 9, 2010, the undersigned responded that the hearing on the recognition bar issue would proceed in order to develop a full and complete record. The undersigned further stated that, if no bar is found, the Region would then consider the Employer's arguments regarding whether a fair election may be conducted, given the pending 8(a)(2) charges.

The primary issue herein concerns whether the Employer's voluntary recognition of Local 707 in September 2008, would bar an election from proceeding at this time under the "recognition bar" principles and procedures stated by the Board in Dana Corp.,

[3] The Employer and Local 707 both continued to raise this issue (whether the representation cases may properly proceed before the unfair labor practices are resolved) during the hearing and in their post-hearing briefs.

supra, and, therefore, whether the parties' subsequent collective bargaining agreement would serve as a "contract bar."

A hearing was held on February 11, March 2 and March 3, 2010, before Linda Harris Crovella, a Hearing Officer of the Board. In support of its position, the Employer called two witnesses to testify: general manager Quinto Rapacioli and assistant general manager John Duncan. The RC Petitioner called four witnesses to testify: drivers John Russell, Nilda Muniz and Vincent Miele, and former driver-trainee Eric Bauwoll. The Hearing Officer also called Local 707 business agent Daniel Pacheco to testify. Neither the RD Petitioner nor Local 707 called witnesses to testify.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Regional Director.

For the reasons discussed below, I conclude that neither the Employer's recognition of Local 707 nor their collective bargaining agreement bars an election in the instant representation cases. I also find it appropriate to direct an election below in the existing unit of drivers, mechanics and utility workers, at a date to be determined.

FACTS

Employer background including corporate identities

As noted above, the Employer provides paratransit services to various entities, including the City of New York. There is no dispute that the specific employer corporation involved herein, MV Public Transportation, Inc., is part of a California-based company called "MV Transportation, Inc." MV Transportation Inc., the parent company, provides various forms of transportation services nationwide. As a local example, MV Transportation Inc. has had a contract since 2001 with the NYC Transit Authority to

provide para-transit services out of a facility in Brooklyn, New York, employing more than 450 employees there.[4] (Those employees are represented by the RC Petitioner herein, Local 1181-1061, Amalgamated Transit Union.)

The record also contains several references to an entity called "MV Transit Inc."[5] even though the NYC Transit Authority contract referred to "MV Public Transportation, Inc." in California as the employer. *See* Jt. Ex. 3. Similarly, documents involved in the Region's voluntary recognition case (Case No. 29-VR-13, described in more detail below), including the Dana notice itself, identified "MV Transit Inc." as the employer. One witness testified that "MV Public Transportation Inc." and "MV Transit Inc." are used interchangeably.

The collective bargaining agreement ultimately executed with Local 707 (Jt. Ex. 1) identified the Employer as "MV Public Transportation, INC. [sic] doing business as MV Transportation." Finally, the payroll records (Bd. Ex. 7) identify the Employer as "MV Transportation, Inc."

The exact status or relationship between these entities has not been litigated, and need not be determined for purposes of these representation cases. However, it is worth noting that references to "the Employer" herein may refer to any one of those three names.

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4 See General Counsel Exhibit 23 in the related unfair labor practice cases. I take administrative notice of those documents and of others from the unfair labor practice case record.

References to the record are hereinafter abbreviated as follows: "Tr. #" refers to transcript page numbers; "Bd. Ex. #", "Jt. Ex. #" and "Er. Ex. #" refer to Board Exhibits, Joint Exhibits and Employer exhibit numbers, respectively, in the instant representation cases. "G.C. Ex. #" refers to General Counsel exhibit numbers from the related unfair labor practice cases.

5 For example, the initial documents concerning Local 707's recognition (Jt. Ex. 6, card check agreement; Jt. Ex. 7, arbitration's certification; and Jt. Er. 2, recognition agreement) all identify "MV Transit Inc." as the employer.

When general manager Quinto Rapacioli was asked to explain how the recognition of Local 707 Teamsters first came about for the Staten Island job involved herein, he gave somewhat vague, hearsay testimony that: "I was informed that we [presumably MV Transportation, Inc.] had a national, nationwide agreement with the Teamsters." However, the record does not contain any specific evidence to show whether the Employer has a collective bargaining relationship with the International Brotherhood of Teamsters elsewhere.

NYC Transit contract, and start-up operations generally

In August 2008, the New York City Transit Authority ("NYC Transit") awarded the Employer a 10-year, $422 million contract to provide "Access-A-Ride" services in Staten Island, New York, to disabled individuals who cannot access other forms of public transportation. At that time, the Employer's facility was located at 125 Lake Avenue in Staten Island. Shortly after the award, the Employer moved its administrative office to 900 South Avenue, Staten Island. In approximately late September 2008, the Employer also opened its "operations" location at 40 LaSalle Street, Staten Island. The LaSalle Street location included a parking lot for the Access-A-Ride vehicles, and an office trailer. Rapacioli testified that these locations were intended to be temporary.[6]

Rapacioli testified that a number of transportation providers responded to NYC Transit's request for proposals for the Staten Island contract, and submitted competing bids. In the end, NYC Transit awarded contracts to multiple contractors, for various portions of the work. Some contracts were awarded to small companies, with as little as

[6] During the next summer, in June 2009, the Employer actually closed both the South Avenue and LaSalle Street facilities, and moved its entire operation to a permanent facility at 1957 Richmond Terrace, Staten Island. However, the instant representation cases involve events that occurred in late 2008, when the Employer's operations were still located at South Avenue and LaSalle Street.

30 to 40 vehicles. Some previous "incumbent" contractors' contracts were renewed, whereas other incumbent contractors (e.g., RJR Paratransit, which had approximately 100 vehicles in Staten Island) were not. Other bidders, like the Employer herein, were new or "non-incumbent" contractors for this particular job.

The Employer's actual contract with New York City Transit (Bd. Ex. 3) contains detailed start-up requirements to make sure that the non-incumbent contractor will be ready for its first day of service. Among other things, the contract requires the contractor/employer to hire in advance enough drivers ("operators") to operate the routes assigned by NYC Transit. NYC Transit requires at least two weeks (80 hours) of training for the drivers. The contract also contains detailed instructions for operating, maintaining and repairing NYC Transit-owned vehicles which the contractor uses to provide the transit service.

The estimated $422 million cost of the Employer's 10-year contract was premised on the Employer receiving approximately 150 vehicles within the first six months, known as the "base" period, and then an additional 150 vehicles in the following six-month "expansion" period. In total, the contract projects using 300 vehicles by the end of 12 months. An appendix to the contract labeled "Start Up and Expansion Plan" provides a more specific schedule for phasing in the vehicles, as follows:

> 15 vehicles within 45 days;
>
> then 20 additional vehicles per month for 3 months;
>
> then 10 additional vehicles per month until 150 vehicles (end of base period); and
>
> during the expansion phase, 10 vehicles per month until the Employer has approximately 300 vehicles.

Thus, the number of routes assigned to the Employer (and therefore the number of drivers required) would gradually increase as the number of vehicles increased. The number of drivers would always exceed the number of vehicles, presumably to account for different shifts, covering absences, and other reasons. It appears from the Employer's records that it generally employs almost twice the number of drivers as vehicles. At the time of the hearing (March 2010), the Employer employed approximately 290 drivers.

Consistent with those numbers, Rapacioli made a projected ramp-up schedule in September 2008 (G. C. Ex. 28 in the unfair labor practice hearing) covering the initial six-month "base" period. The chart contains *inter alia* the following projections:

date	**# of vehicles**	**# of routes**	**# of drivers**
10/1/2008	11	8	9
10/6/2008	11	8	9
10/13/2008	11	12	15
10/20/2008	17	23	27
…			
11/17/2008	39	53	64
…			
12/22/2008	61	83	100
…			
1/19/2009	83	113	136
…			
2/16/2009	94	128	154
…			

3/16/2009	105	143	172

Rapacioli testified generally it is difficult to obtain enough drivers who are qualified for this type of Access-A-Ride work. Drivers must go through extensive screening, including driving records, criminal records, drug tests, etc. They must obtain the required "Article 19(a) certification" from the New York State Department of Motor Vehicles, and ultimately the approval of NYC Transit. The Employer may "hire" drivers (at least provisionally) and start the required two-week training, while they wait for the required approvals. However, according to Rapacioli, there is a high turn-over rate in the industry, especially during the first few months for new/inexperienced drivers, and many applicants fail to meet the stringent requirements. Rapacioli explained that, consequently, the Employer must extend preliminary job offers to many more drivers than the Employer will actually need, because a significant number of inexperienced drivers either fail to show up for the training, or drop out of the training (e.g., if they decide they do not like the work or the hours), or fail to get the required certifications and approval. As a result, the Employer must expect to "take a loss" paying many trainees who will not ultimately qualify, in order to yield a sufficient number of drivers to cover the routes required at each stage of the start-up operation.[7] For example, according to Rapacioli, a class of 30 trainees may end up yielding only 5 drivers.

Another challenge for staffing the routes during the start-up period involved NYC Transit's policy limiting new contractors from hiring experienced drivers away from other contractors. During the same time that new contractors must "ramp up" to accept more vehicles and routes, the prior incumbent contractors who were not awarded new

[7] The Employer pays driver-trainees $9.00 per hour. When they start working as drivers, they increase to $11 per hour.

contracts must go through a phase-out or "ramp down" process. During that transitional period, NYC Transit must still rely on the out-going contractors to provide services. In a letter to the Employer (Bd. Ex. 5, dated 8/29/08), the NYC Transit contract manager explained:

> [A]ny transfer of employees must be addressed and handled in an organized and manageable fashion. As such, NYC Transit will work closely with you and help coordinate such transfers so as not to adversely affect the overall program.

Thus, although the letter does not outright ban the hiring of other contractors' employees, such hiring cannot occur unless and until NYC Transit approves of the transfer. Rapacioli explained that NYC Transit will not approve any such transfers, or assign the specific vehicles or routes to a new contractor, until NYC Transit is ready to "release" them from the old contractors. Thus, during the transitional period, the new contractor has to recruit and train a higher proportion of new drivers.

Despite the initial projections described above (i.e., NYC Transit's projections of the Employer's start-up schedule, and Rapacioli's own projections), Rapacioli repeatedly stated at the hearing that the Employer had no idea how many vehicles it would get and how many employees it would need. He testified that the NYC Transit contract does not "require" NYC Transit to provide specific numbers of routes at specific times. Although he knew early on that certain incumbent contractors (Transit Facility Management and American) failed to get their contracts renewed, he claims he did not know for sure that contractor RJR Paratransit's services were terminating until December. Thus, according to Rapacioli, there was still "some question" in November regarding how many of RJR's former routes and vehicles would be assigned to the Employer, and when NYC Transit

would "release" RJR's drivers for other contractors to hire. Although he knew of the "possibility" of getting RJR's vehicles, he denied knowing specifically when NYC Transit would authorize the transfers until only 3 to 5 days in advance.

Late August – early September: Employer begins hiring and training drivers

Rapacioli testified that the Employer started hiring and training driver-trainees in late August 2008,[8] in order to have enough drivers in place by October 1, when the NYC Transit would start assigning routes to the Employer. The Employer's driver training generally took at least 2½ weeks, including one week of in-class training and orientation (at the Employer's South Avenue office facility) and one week of "behind the wheel" training (from the LaSalle Street location). Some trainees have to wait more than two weeks to drive if their Article 19(a) certification is delayed. For example, Petitioner witness Nilda Muniz, a driver who began training in early October, testified that she did not obtain her 19(a) certification until mid-November. After she finished the in-class training, she remained on stand-by status as a "cadet" in late October and early November, waiting for a chance to ride with an experienced driver. (Driver-trainees cannot operate the vehicle unless and until they have the required certification.)

According to Rapacioli, the first training class in late August had about 12 driver-trainees, and the second had about 20 driver-trainees. As discussed in more detail below, the Employer continued to conduct training throughout the start-up period, as it hired more and more drivers.

Employer's recognition of Local 707

8 All dates hereinafter are in 2008, unless otherwise indicated.

As noted earlier, Rapacioli vaguely explained that the contact with Local 707 came about because he was "informed" that the Employer ("we") had a national agreement with the Teamsters. The initial contact between the Employer and Local 707 specifically for the Staten Island contract is not described in the record. Nevertheless, there is no dispute that on or about August 28, when the Employer employed the first group of 12 driver-trainees, the Employer and Local 707 signed a "card check and neutrality agreement" (Jt. Ex. 6), in which the Employer agreed to recognize Local 707 as the collective bargaining representative of its drivers in Staten Island upon a showing of majority status. (The bargaining unit described in the agreement excluded "mechanics and similar maintenance employees.") The agreement specified a procedure for having a neutral third party check whether Local 707 obtained signed authorization cards from the majority of unit employees. Although the card-check agreement did not expressly allow Local 707 access to the Employer's property, Rapacioli testified that Local 707 business agent Danny Pacheco spent some time "at the door" (presumably one of the trailer doors) getting employees to sign cards. There is no dispute that some driver-trainees indeed signed authorization cards.[9]

In the meantime, on August 29, NYC Transit sent a letter congratulating the Employer for winning the Staten Island Access-A-Ride contract (Bd. Ex. 5), although it did not send the official Notice of Award and contract until the next week (Bd. Ex. 3, dated 9/5/2008).

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9 The Consolidated Complaint in the unfair labor practice proceeding alleges various violations in connection with the solicitation of employees' signatures. The ALJ has not yet made any findings in those cases. In any event, this card-solicitation issue will not be addressed in detail for purposes of the instant representation cases.

On September 11, an arbitrator signed a "certification of results of card check and count" (Jt. Ex. 7). According to the arbitrator, the Employer employed 22 "drivers" at that time. The arbitrator stated that Local 707 had submitted 20 authorization cards (i.e., a majority of those first 22 "drivers"), designating Local 707 as their collective bargaining representative.

The next day, on September 12, the Employer and Local 707 signed a recognition agreement (Jt. Ex. 2) for bargaining-unit drivers in Staten Island. There is no dispute that the Employer employed about 22 driver-trainees at that time. However, none had actually worked yet as "drivers," since the Employer's route assignments were not scheduled to commence until October 1. The Employer employed no mechanics or utility workers as of the recognition date. As the earlier card-check agreement did earlier, the recognition agreement expressly excluded mechanics and utility workers from the bargaining unit.

Dana notice

On or about September 15, Local 707's attorney notified the Region of Local 707's status as the recognized collective bargaining representative of drivers employed by the Employer in Staten Island. (Jt. Ex. 3, Case No. 29-VR-13).

On October 2, based on information submitted by the parties, the Region sent notices to be posted at the Employers' facility pursuant to Dana Corp., 351 NLRB 434 (2007), for the unit of drivers (Jt. Ex. 4). The Dana notice itself (page 4 of Jt. Ex. 4), by its terms, notified employees: (1) that the Employer ("MV Transit Inc.") had recognized Local 707 as the bargaining representative for the drivers employed in Staten Island; (2) that employees have the right to a Board-conducted, secret-ballot election; (3) that a

decertification petition or a rival representation petition could be filed within 45 days of the Notice posting; but also (4) that if no such petition was filed within 45 days, then Local 707's status could not be challenged for a reasonable period of time, to allow Local 707 and the Employer an opportunity to negotiate a collective bargaining agreement.

The circumstances of the Dana Notice posting were disputed in the representation case hearing, as well as the unfair labor practice hearing. Generally, the Employer's witnesses testified that the Notice was posted in the Employer's LaSalle Street trailer from October 5 to November 20, whereas Local 1180's witnesses denied seeing any such posting in the trailer during that time period. Specific testimony will be detailed below, after a brief description of the trailer itself.

Witnesses testified that the trailer was a large (10 feet by 60 feet), construction-office trailer. It contained a dispatch room, an office for managers Rapacioli and Duncan, and a drivers' room measuring approximately 10 feet by 10 feet. Many types of notices were posted on bulletin boards and nearby walls inside the drivers' room. Typical notices included NYC Transit notices; memoranda from the Employer regarding shift changes, safety meetings, seniority lists, and drivers' on-time percentage charts; and traffic and street closure reports. Muniz estimated that were usually at least 20 postings on the wall.

There is no dispute that drivers report to the drivers' room every morning to receive their route manifests for the day. They also check in there at the end of each shift to submit paperwork to the dispatchers. The record also indicates that, after finishing the in-class training at South Avenue, trainees generally report to the LaSalle street trailer to "stand by" for an opportunity to go on the road with one of the drivers.

As for the Dana notice specifically, the record indicates that Region 29 mailed the Notice to the Employer on Thursday, October 2. Rapacioli initially asserted that the notice was posted on October 5. However, he testified that he did not remember whether he himself posted the Dana notice, or whether his assistant general manager John Duncan posted it. He stated: "For the longest time, I thought I posted it, but my assistant pointed out that he posted it, [that] I gave it to him to post it" (Tr. p.73) and "Again, I think I posted it on the 5th, but he's telling me he posted it" (Tr. 86). Rapacioli did not recall specifically what day of the week it was posted. He explained that the Employer generally receives mail Mondays through Saturdays, although the Employer's copy of the Dana notice (submitted as Employer Exhibit 8 in the unfair labor practice hearing) appears to be stamped as "received" on October 5, a Sunday. Rapacioli testified that he himself opens all the mail at the Employer's South Avenue facility; that he does not know whether "anyone" normally stamps mail with the date received; that he did not even recognize the "received" stamp as coming from the Employer's office; and that he could not explain why the Employer would have received mail on a Sunday. In any event, Rapacioli continued to insist that the Notice was posted on October 5. He conceded that he did not physically see Duncan post the notice, but only that Duncan told Rapacioli afterward ("probably" on October 6) that he had posted it. Rapacioli also stated that Duncan said he (Duncan) had taken a photo of the posted Dana notice, but no such photo was submitted into evidence. Rapacioli further stated that, thereafter, he saw that the Dana notice was posted on the wall right next to the trailer door, and that it remained posted there for the required 45-day period. He said that drivers "could not miss" the Dana notice because of its unusually large size and blue-colored portions.

Rapacioli stated that he himself filled out the Board's "Certification of Posting of Dana Notices" form (part of Jt. Ex. 5) on November 20. Jt. Ex. 5 indicates that Local 707's attorney submitted the Certification to Region 29 on November 20.

Assistant general manager Duncan began working as the assistant general manager for MV Public Transportation[10] on September 22, 2008. He testified that the Employer was extremely busy during the start-up period, and that he worked long hours. He estimated spending about 60 hours per week in the trailer through November. According to Duncan, Rapacioli gave him a copy of the Dana notice during one of their daily meetings, and that he himself (Duncan) posted it in the drivers' room on the evening of Sunday, October 5. Like Rapacioli, Duncan stated the notice was posted on the wall next to the trailer door near some other postings, and that drivers "couldn't miss it." Finally, he testified that he continued to see the Dana notice posted during the required posting period. According to Duncan, it was never defaced, removed or covered up by other postings.

In total contrast, Local 1181's four witnesses testified uniformly that they never saw any Dana notice posted in the drivers' room. Driver Vincent Miele, who was hired in mid-September and started reporting to the trailer for behind-the-wheel training in early October, did not recall seeing the notice. Witnesses Nilda Muniz, John Russell and Eric Bauwoll all started reporting to the trailer on a daily basis in late October (i.e. after the notice was allegedly posted, but still during the 45-day posting period). They sometimes spent hours in the trailer, waiting for their chance to go out on a route. Those three witnesses testified that they never saw a Dana notice.

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10 Duncan previously worked for MV Transportation, Inc.

October – December: Employer continued to ramp up

In the meantime, the Employer started providing services under the NYC Transit contract on October 1, a few days before the Dana notice was allegedly posted. NYC Transit initially assigned 10 or 11 vehicles to the Employer, to run 8 routes. The record indicates that the Employer employed approximately 12 drivers at that time, plus 70 to 80 driver-trainees.

There is no dispute that the numbers of vehicles, routes and drivers continued to increase in the following months. A series of e-mail messages from NYC Transit shows how routes were added on a weekly basis for several months. (*See* Bd. Ex. 4, schedule and ramp-up notices from manager of NYC Transit paratransit schedule unit.) The record indicates that, by the end of November, the Employer employed more than 100 drivers and driver-trainees.[11] Rapacioli testified that there was a particularly large hiring increase in December, once NYC Transit "released" vehicles and drivers from out-going contractor, RJR Paratransit. He estimated that, by late December, the Employer had approximately 99 routes, with 120 to150 drivers. The numbers then continued to grow into the following months of 2009. Rapacioli stated that the number of drivers remained fairly steady for a while in late 2009, at about 250 to 260 drivers. Then there was another increase in January 2010, when the NYC Transit gave the Employer at least 20 more routes and vehicles. Thus, by the time of the instant hearing in March 2010, the Employer had approximately 129 vehicles and 280 to 290 employees. In fact, Rapacioli testified that the Employer was still expanding as of the hearing, i.e., still hiring and training more drivers in order to accept more vehicles and routes from NYC Transit.

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11 Rapacioli stated that the Employer's negotiations with Local 707 for a collective bargaining agreement began in late November.

Also during the expansion period in late 2008, the Employer started hiring mechanics and utility workers. Payroll records for the Employer's biweekly pay periods (Br. Ex. 7) show the following numbers:

pay period	mechanics	utility workers[12]
ending 9/19/08:	0	0
ending 10/3/08:	0	1
ending 10/17/08:	0	6
ending 10/31/08:	0	9
ending 11/14/08:	5	3
…..		
ending 12/26/08:	5	13

Thus, the number of mechanics stayed at zero for the months of September and October, then stayed steady at 5 for November and December. The number of utility workers grew from 1 in early September to 13 by late December. The record clearly shows that the Employer did not employ any mechanics or utility workers at the time it recognized Local 707 on September 12. As noted above, neither the parties' recognition agreement nor the Dana notice included those classifications in the bargaining unit. In fact, those documents expressly excluded them. Nevertheless, Rapacioli testified that he "thinks" the recognition of Local 707 to represent bargaining-unit employees, including the mechanics and utility workers, was "all done at the same time" on September 12.

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12 The "utility workers" classification appears to include maintenance trainees, some of whom later became mechanics.

(The record does not indicate how many mechanics and utility workers were employed thereafter in 2009, or at the time of the hearing in March 2010.)

Employer's collective bargaining agreement with Local 707

As noted above, Rapacioli testified that contract negotiations with Local 707 commenced in late November 2008. Local 707 business agent Daniel Pacheco testified that he "thinks" negotiations took place some time in November. There seems to be no dispute that those parties came to some kind of agreement by December 12.[13] There is no dispute that on or about December 12, the Employer ("MV Public Transportation, INC. doing business as MV Transportation") and Local 707 executed a collective bargaining agreement covering a unit of drivers, mechanics and utility workers (Jt. Ex. 1). It is a five-year agreement, effective by its terms from December 12, 2008, to December 31, 2013.

The collective bargaining agreement describes the bargaining unit as follows:

> The bargaining unit includes full time, part-time and casual drivers, mechanics and utility workers working under any Contract between the Company and New York City Transit Authority excluding office clerical employees, mechanics, utility workers, professional employees, road supervisors, dispatchers, guards and supervisors as defined in the act.

(Jt. Ex. 1, Section 2.2, emphasis added.) Thus, the agreement expressly included mechanics and utility workers in the bargaining unit for the first time, although it mistakenly failed to remove them from the exclusions.[14]

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13 The record contains conflicting evidence on whether the contract was "ratified" by unit employees on November 11 or on a different date. As discussed in more detail below, a union security provision's validity must be assessed from the face of the contract itself, for contract bar purposes. Thus, specific evidence regarding contract ratification date is not relevant, and will not be described in detail herein.

14 The contract's contradictory inclusion and exclusion of mechanics and utility workers was a mistake. There is no dispute that the Employer and Local 707 meant to include mechanics and utility

The agreement also includes, *inter alia*, the following union security clause:

> An employee assigned to a covered classification which is employed by the Company on the date of contract ratification, as a condition of employment, will become and remain a member in good standing of the Union, not later than the 31st day following the employee's completion of training or the contract ratification date, whichever is later. For purposes of this article and [sic] the employee shall be considered a member in good standing if he/she tenders the uniformly required periodic dues and initiation fees related to representation costs.

(Jt. Ex. 1, Section 3.2.) The contract goes on to explain how employees who have not complied with the membership requirements may be terminated from employment. Although the unfair labor practice cases involve allegations regarding enforcement of the union-security provision, specific evidence of enforcement (or non-enforcement) is not relevant for representation cases purposes,[15] and will not be described here in detail.

DISCUSSION

As noted above, the primary issues herein concern whether the Employer's voluntary recognition of Local 707 in September 2008, bars an election under the Board's recognition bar principles and under the specific procedures in Dana Corp., *supra*, and therefore whether the parties' subsequent collective bargaining agreement would serve as a "contract bar."

Background – recognition bar doctrine before *Dana Corp*.

In developing the doctrine of recognition bar in representation cases over the years, the Board has attempted to balance a number of conflicting concerns. In Keller Plastics Eastern, Inc., 157 NLRB 583 (1966), an unfair labor practice case, the Board

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workers in the unit at the time of contract execution. And, in fact, the contract has specific wage provisions for mechanics and utility workers (Jt. Ex. 1, p.21).

held that the lawful, voluntary recognition of a union based on a demonstration of majority support entitles a union to a "reasonable" time period in which to bargain and execute contracts. Id. at 587. Subsequently, in Sound Contractors Assn., 162 NLRB 364 (1966), the Board extended that same principle to representation cases, holding that an employer's lawful recognition of a union would bar a subsequent, rival petition for a reasonable period of time, in order to give the lawfully-recognized union a chance to bargain without disruption. In order for the recognition to bar an election under Sound Contractors, however, it must have been extended (1) in good faith, (2) on the basis of a previously demonstrated showing of majority support, and (3) at a time when only that union was "actively engaged" in organizing unit employees. Id. at 365.

In the 40 years since Sound Contractors, the issue of rival unions (i.e., an employer's recognition of one union, at a time when two unions are attempting to organize the same employees) proved to be more vexing. In attempting, on one hand, to encourage the stability of labor relations and to encourage employers to recognize unions voluntarily when appropriate and, on the other hand, to protect employees' free choice from possible employer manipulation, the Board has struggled to determine at what point one union's campaign is significant enough to preclude the employer's recognition of another union from barring an election. *See* Bruckner Nursing Home, 262 NLRB 955 (1982); Rollins Transportation System, Inc., 296 NLRB 793 (1989); Smith's Food & Drug Centers, Inc., 320 NLRB 844 (1996). In those cases, the Board expressed concerns, *inter alia*, regarding the possibility of collusive "sweetheart" deals between employers and their preferred unions while a rival is in the wings. *See e.g.*, Smith's Food & Drug, 320 NLRB at 846. However, regardless of the various ways that the

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15 Paragon Products Corp., 134 NLRB 662, 667 (1962).

Board addressed the rival union situations in those cases, it should be emphasized that the first two requirements of Sound Contractors expressly continued to apply. *See* Smith's at n. 3. That is, in order for an employer's recognition of a union to bar an election, the recognition itself must have been (1) in good faith and (2) based on a previously-demonstrated majority status. *See also* MGM Grand Hotel Inc., 329 NLRB 464, 466 (1999)(recognition bar appropriate where recognition was "based on a demonstration of majority support" and "freely chosen by employees").

Although the Board has overruled Keller Plastics and Smith's in some respects,[16] there is no indication that the Board intends to ignore the crucial threshold issue of majority support, or that it will allow parties to use the Dana mechanism to "validate" invalid recognitions of minority unions.[17] Thus, in my view, these crucial factors must still be considered whenever a recognition-bar issue is raised in a representation case, in addition to the specific mechanisms of Dana.

16 Dana, 351 NLRB at 441, fn. 33. For example, where earlier cases imposed an *immediate* bar upon proper voluntary recognition, Dana does not impose a bar until 45 days after the required notice posting.

17 In Dana and its companion case Metaldyne Corp., there was no specific evidence that the authorization cards were coercively obtained or otherwise tainted, so the recognized unions in those cases were "presumed" to have valid majority support. *Id*. at p. 436. Thus, the Board did not have reason to address the minority/majority support issue.

Expanding bargaining unit situations

The issue of majority support poses a special challenge when a new bargaining unit is expanding substantially. Specifically, trying to gauge "majority support" too early in a small group of employees may not accurately represent the views of the ultimate, larger group. As the Board stated in Elmhurst Care Center, 345 NLRB 1176 (2005), *enf'd* 2008 WL 5378004 (D.C. Cir. 2008)(case not published in Federal Reporter), the *timing* of any recognition requires a careful balance between the interests of the new employees and future employees:

> The Board has long balanced competing interests in these cases. On one hand, the Board seeks to vindicate the right of those employees already employed, to engage in collective bargaining if they so choose. On the other hand, the Board seeks to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated complement of the unit employees – all of whom will be bound, at least initially, by the choice of those who were hired before them.

Id., 345 NLRB at 1176-7.

Balancing those two interests, the Board has held that the representative status of employees in an expanding unit cannot be determined until the time when the employer (1) employs a substantial and representative complement of its projected workforce, and (2) is engaged in normal business operations. Id., at 1177. These issues arise in many different contexts, in both representation cases and unfair labor practice cases.

In General Extrusion, Co., Inc., 121 NLRB 1165 (1958), a representation case, the Board held that a newly-recognized union's collective bargaining agreement will not bar a rival union's election petition unless, at the time of the contract, the employer employed at least 30 percent of its ultimate employee complement in at least 50 percent of the job classifications. Conversely, in cases typically involving initial organizing by one union,

an election may proceed as soon as such a "substantial and representative complement" exists, despite an employer's possible desire to postpone the election until later into its expansion. General Cable Corp., 173 NLRB 251 (1968); Toto Industries (Atlanta), Inc, 323 NLRB 645 (1997); Yellowstone International Mailing, Inc., 332 NLRB 386 (2000), *summary judgment granted sub nom* Deutsche Post Global Mail Ltd., 334 NLRB No. 102 (decision not published), 171 L.R.R.M. 1327 (2001), *enfd.* 315 F.3d 813 (7th Cir. 2003). Although the expanding unit cases do not strictly follow the General Extrusion percentages, they use General Extrusion as a guide to assure that a representative complement exists before any valid determination of majority status can be made.

In other representation cases involving expanding units, the Board may retroactively revoke a union's status as the certified bargaining agent, if the Board later learns that such certification was improperly and prematurely granted. In New York Rehabilitation Care Management, d/b/a New York Center for Rehabilitation Care et al.,[18], for example, the employer operated a health-care facility at one location (21st Street), where its employees were represented by 1199, New York's Health and Human Service Employees' Union, S.E.I.U. ("1199"). The employer decided to close the 21st Street facility and open a new facility six blocks away (27th Street). The employer applied for approval from the New York State Department of Health ("DOH") to operate a 300-bed facility, which was expected to require more than 300 employees. The employer planned to move most of its 21st Street employees to the new facility, although it failed to notify 1199 of its plan. Before the new facility had even received DOH approval to begin operating, Local 300S, Production Service & Sales District Council, U.F.C.W. ("Local

18 Reg. Dir.'s Order and DDE, Case Nos. 29-RC-9785 and 29-RC-9937 (Jan. 4, 2004), *review denied* (unpublished order, March 10, 2004); *related test-of-certification case*, 344 NLRB 1243 (2005).

300S") filed a petition seeking to represent certain employees at the new facility. The employer and Local 300S entered into a stipulated election agreement, without notifying the Region of 1199's potential interest in the bargaining unit, and without notifying the Region that the facility's workforce would greatly expand in the near future. At the time of the election, the voting list consisted of only 41 employees who had been hired the week before, most of whom had worked 8 hours or less during that week, and who performed only some cleaning and preparatory work for the facility's future opening. An election was held, and Local 300S was certified as the collective bargaining representative in mid-March 2002, several weeks before the 27th Street facility even accepted its first two patients in late April 2002. Within six months (October 2002), the operation expanded to 80% patient capacity, with approximately 207 employees. Ultimately, once the facts came to light, the Region retroactively revoked Local 300s' March 2002, certification, in part, because the election was held prematurely, when less than 20% of the ultimate complement (300 employees) was employed. The Region also questioned the eligibility of the voters in that case, given their extremely limited hours and type of work. Finally, the Region also based its revocation on the parties' failure to notify it of 1199's presence and 1199's consequent exclusion from the ballot. In short, the Region, as upheld by the Board, revoked the certification, both in order to protect the employees' right to choose their own representative, and in order to protect the integrity of the Board's processes. *See also* Rivera Mines Co., 108 NLRB 112 (1958)(approval of consent election agreement withdrawn due to expansion of bargaining unit, combined with employer misconduct); Gilmore Motors, 121 NLRB 1672 (1958).

Similarly, in such unfair labor practices cases as Ten Ecyk Hotel Associates, d/b/a Hilton Inn Albany, 270 NLRB 1364 (1984), the Board has used the General Extrusion formula as guide for determining whether an employer prematurely recognized a labor organization before the substantial and representative complement was achieved, in possible violation of Section 8(a)(2) of the Act. *See also* Garner/Morrison, LLC, 353 NLRB No. 78 (2009), slip op. at p.5, fn. 13. The Board also considers whether an employer was engaged in its "normal business operations" at the time of recognition. Hilton Inn Albany, *supra*, 270 NLRB at 1365; *see also* A.M.A. Leasing Ltd., 283 NLRB 1017, 1024 (1987).

In Hilton Inn Albany, *supra*, the employer was planning to open a 393-room hotel on November 29, 1981, which would eventually require about 220 to 230 employees. Almost four weeks before the opening, the employer had "hired" 64 employees, but about half of them had not yet performed any work for the employer. Of the 31 employees who had performed some preparatory tasks (e.g., cleaning, training), only 18 had worked more than 8 hours. On November 2, 1981, the employer held a meeting, during which a union obtained 34 signed cards out of the 64 employees. The employer recognized the union on November 4, 1981. At the trial, a hotel official testified that he had expected a "slow start-up" and would hire only 60 to 70 employees for the opening, and then take at least 1½ years to reach the full complement of 220 to 230. However, the Board discredited the testimony, finding instead that the employer knew he would expand greatly and immediately expand the workforce during the month of November. (The employer indeed went on to hire over 200 employees by the opening day.) On these facts, the Board found that the 31 employees who had worked at least a few hours by the

date of recognition constituted only 15% of the 200 employee opening day complement, and therefore did not represent a substantial and representative complement of the ultimate workforce . (The record was not entirely clear on the number of classifications.) The Board further found that those employees were engaged only in "the very earliest stages of preparation," not in the employer's normal business operation of serving hotel guests. Id., 270 NLRB at 1366. Therefore, the Board concluded held that the recognition was premature and unlawful.

The Elmhurst Care Center case, cited *supra*, was an unfair labor practice case involving the same rival unions as the New York Rehabilitation representation case. In Elmhurst, the employer recognized Local 300S to represent employees at a new facility in mid-March 1999, before the facility even opened. The relatively small number of employees who signed authorization cards at that time[19] had worked only a limited number of hours, engaged in training and preparing for the facility's opening. The first patient was not admitted until a month later in mid-April 1999. Thus, the recognition occurred at a time when no employees were performing their principal duties of patient care. The Board concluded that the March recognition was unlawful and premature because the employer was not yet engaged in its "normal business operations." Elmhurst, 345 NLRB at 1177.

An unfair labor practice case involving a transit employer whose workforce expanded after winning a bid to provide Access-A-Ride services, Dedicated Services, Inc., 352 NLRB 753 (2008), is also relevant here. The case involved two corporations, who were ultimately found to constitute a single employer. Dedicated Transportation had

19 The Elmhurst unfair labor practice case involved many allegations, including that the cards were unlawfully obtained.

been engaged in providing transit and ambulette services since 2003; its employees were represented by Local 713, International Brotherhood of Trade Unions. It submitted a bid to provide Access-A-Ride services for NYC Transit. In late 2006, NYC Transit awarded the contract to Dedicated Transportation. Shortly thereafter, the owner formed a separate corporation for the Access-A-Ride contract, Dedicated Services, Inc. The contract contemplated that Dedicated Services would operate about 50 vehicles with about 100 drivers. The employer discussed with Local 713 representatives the possibility of applying the Dedicated Transportation collective bargaining agreement, with some changes, to a new unit of Dedicated Services employees. At some point in the process of recruiting and hiring drivers, the employer told a group of applicants to meet on February 5, 2007, to fill out application paperwork. At least one applicant was told to sign a card for Local 713. That same day, when the employer did not actually employ *any* employees, it signed a recognition agreement. The employer and union claimed that six "employees" signed cards, out of approximately 10 "employees" on that date. However, the employer did not start training and paying drivers until the next week (February 12, 10 drivers), and did not begin providing Access-A-Ride services for another two weeks after that (February 26). The Board found the February 5 recognition to be unlawful because, *inter alia*, the employer employed no employees on that date. The administrative law judge had also found premature recognition on an alternative theory, that even if Local 713 achieved majority support of the 10 "employees" at that time, the recognition would have been premature because the employer employed far less than 30% of its ultimate employee complement (approximately 100 drivers) and was not yet

engaged in its normal business operations.[20] However, the Board found it "unnecessary" to discuss the administrative law judge's alternative theory, given its finding that the Employer did not employ *any* employees at the time of recognition.

The cases cited above indicate that the Board may use different benchmarks for determining the ultimate employee complement, such as the number of employees expected to be employed when the unit is fully expanded (Dedicated Services, when employer obtained its expected 50 vehicles; NY Rehab, when health-care facility filled its 300-bed capacity), or when the employer commences its actual operations (Hilton Inn Albany, when hotel opened to customers).

Thus, in a variety of "expanding unit" contexts, the Board has always adhered to a basic principle – that valid determinations of employees' representational status can be made only when there is an adequate, uncoerced employee complement, whose desires are deemed likely to reflect the ultimate, larger group's desires. Specifically, in assessing voluntary recognition bar in an expanding unit context, the "previously-demonstrated majority status" required by Sound Contractors and its progeny cannot be determined unless and until such a substantial and representative complement exists.

The Board's Decision in Dana Corp.

In Dana Corp., 351 NLRB 434 (2007), the Board expressed concern that granting *immediate* bar status after a voluntary recognition may not adequately protect the affected

[20] It is interesting to note that Dedicated Services did not raise any Dana notice issue, even though both the ALJ's decision and the Board's decision issued several months after Dana. This fact underscores the point that, even after Dana, a voluntary recognition may be invalidated if the union failed to demonstrate true majority support at the appropriate time. The additional notice-posting required by Dana does not change that important, threshold requirement.

employees' statutory right to free choice, and may not give "proper effect" to the long-standing preference for resolving questions concerning representation through a Board-conducted election. Id., at p.437. In part, this is because the card-solicitation process is more "public" and susceptible to group pressure than a secret-ballot election under the "watchful eye" of a Board agent. Id. at 438. Although the Board will continue to honor voluntary recognition in the appropriate circumstances, the Board in Dana sought to preserve employees' rights to choose a method that assures greater reliability, fairness and certainty in the final outcome. Id. at 439-40.[21]

Accordingly, the Dana Board upheld the validity of the recognition bar doctrine in representation cases, but it also added significant restrictions intended to safeguard the rights of dissenting employees. Specifically, rather than letting a voluntary recognition immediately block a rival petition, Dana requires a 45-day notice-posting period wherein unit employees are notified of the recognition and of their right to seek an election:

> In order to achieve a "finer balance" of interests that better protects employees' free choice, we herein modify the Board's recognition-bar doctrine and hold that no election bar will be imposed after a card-based recognition unless: (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition of a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed.

Dana, 351 NLRB at 434 (internal citations omitted). In other words, an otherwise-valid voluntary recognition would not bar an election unless and until the 45-day notice-posting period passed and no other petition was filed. If the 45-day period indeed passed

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[21] The Board also suggested that in certain circumstances (such as when the parties' "pressure" on employees is objectionable but does not rise to the level of an unfair labor practice), the Board electoral process provides better protection for employees than the opportunity to file unfair labor charges.

without a petition, then the recognition would bar any subsequent petitions for a "reasonable period of time" to enable the parties to engage in negotiations for a first collective bargaining agreement. Id., at 441.[22]

The Board also specified that the voluntary recognition must be memorialized in writing. Promptly after such recognition, the employer and/or recognized union must notify a regional office of the Board to obtain a Dana notice for posting. Both the written recognition agreement and the Dana notice must identify the bargaining unit and the date of recognition. Id., 443 and fn. 38. And the notice itself must be posted in "conspicuous places at the workplace" for the entire 45-day period. Id. at 443.

Finally, the Board made "parallel modifications" to its contract bar rule, holding that "a collective-bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless notice of recognition has been given and 45 days have passed without a valid petition being filed." Id., at 435.

APPLICATION TO THE INSTANT CASES

Turning to the facts of the instant representation cases, it is clear that the Employer's recognition of Local 707 as its drivers' collective bargaining representative on September 12, 2008, does not bar an election.

Premature recognition in the expanding unit was void *ab initio*

22 As noted earlier, there was no specific evidence in Dana and its companion case Metaldyne Corp. that the authorization cards were coercively obtained or otherwise tainted, so the recognized unions in those cases were "presumed" to have valid majority support. No 8(a)(2) violations were alleged in connection with those grants of recognition. *Id*. at p. 436. Thus, the Board did not have reason to address the minority/majority support issue. Nevertheless, presuming that the original majority support was valid, the Board held that a continued majority support would be "irrebuttably presumed" for a reasonable time after the Dana notice requirements were met. Id., p.441. Elsewhere, the Board preconditions a valid recognition on majority support (e.g., a union may bargain pursuant to recognition if it had obtained a "solid card majority", id. at 442).

As set forth above, the Employer bid on a 10-year contract to provide Access-A-Ride services. The $422 million cost was premised upon the Employer receiving about 300 vehicles within the first 12 months. Both the NYC Transit contract and Rapacioli's own ramp-up schedule in September 2008, projected that the number of drivers would rapidly increase from the first day of operation (October 1) to the 150 vehicle mark expected within six months. For example, Rapacioli's chart projected employing approximately 9 drivers when operations began on October 1, 2008, and steadily increasing the number to 172 drivers by mid-March 2009.

At the time when the recognition agreement was executed on September 12, the Employer employed only 22 driver-trainees. Even if driver-trainees are considered "employees," that small number is less than 10% of the Employer's projected workforce of more than 300 drivers. And even if earlier benchmarks are used, the number of driver-trainees still would not exceed 30%. For example, the 22 driver-trainees constituted only 24 to 27% of the number of drivers (12) and trainees (70 to 80), totaling 82 to 92, employed on the first day of operation (October 1). They constituted only 13% of the drivers (excluding trainees) whom Rapacioli expected to employ after the six-month base period (March 2009). The recognition therefore failed to meet the first prong of the Board's "complement" test, i.e. that the employer must have employed a "substantial" complement (e.g., 30%) of its projected workforce. Hilton Inn Albany, *supra*, 270 NLRB at 1365, citing General Extrusion.[23]

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[23] In its post-hearing brief, Local 1181 (RC Petitioner) questions whether the 22 drivers-trainees were even "employees" at the time of recognition. The record indicates that they were being paid during training, but they were engaged *only* in training at that time, more that two weeks before any drivers started engaging in the Employer's principal business of providing transportation services on October 1. However, we need not reach that issue because, even if the driver-trainees were considered employees, their small number did not exceed 30% of the larger complements set forth above. Nevertheless, the presence of

Furthermore, the driver-trainees employed at the time of recognition constituted only one job classification out of at least 3 classifications eventually encompassed by the parties' collective bargaining agreement. There is no dispute that the Employer employed no mechanics or utility workers at that time. Thus, the September 12 recognition also failed to meet the second prong of the "representative complement" test, using General Extrusion as a guideline, inasmuch as less than 50% of the job classifications had any employees in them at the time recognition was extended.

As noted above, Rapacioli testified at length regarding the difficulty of hiring enough qualified drivers in the transit industry. Many driver-trainees drop out of the training for various reasons and/or fail to meet the stringent requirements of Article 19(a) certification. Rapacioli explained, as an example, that a class of 30 trainees may yield only 5 drivers. This testimony further supports the idea that the 22 driver-trainees employed as of September 12 were not a reliable indicator of future drivers' desires. The fact that many of them were expected to quickly leave the Employer's employ, perhaps akin to temporary employees, raises the question of whether their interests would have aligned with the interests of future drivers who would complete the training/certification process and work for the Employer indefinitely.

In short, at the time when the Employer recognized Local 707 on September 12, 2008, it clearly did not employ a substantial and representative complement of the eventual, larger unit of employees to be hired during the imminent expansion. Under such expanding-unit cases as New York Rehabilitation cited *supra*, the very small group cannot be deemed to adequately represent the views of the larger group. In other words,

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trainees at the time of recognition may be relevant for determining whether the Employer was engaged in "normal business operations," as discussed *infra*.

even assuming that 20 of the 22 driver-trainees employed at that time genuinely and freely supported Local 707, it was simply too early to gauge whether Local 707 would have majority support in the larger unit. Accordingly, Local 707 could not have demonstrated the valid "majority status," required under such recognition bar cases as Sound Contractors and MGM Grand Hotel Inc., cited *supra*, at the time of recognition. Furthermore, driver-trainees employed on September 12 constituted only 33% of the three job classifications that the Employer expected to employ; their views would not necessarily represent the views of mechanics and utility workers hired later. Thus, to allow the Employer's recognition on that basis to bar elections on subsequent petitions would improperly deprive future employees of their Section 7 right to make their own choice regarding union representation.

Moreover, the record demonstrates that the Employer was not yet engaged in "normal business operations" at the time of recognition, as required in such expanding-unit cases as Hilton Inn Albany, Elmhurst and Dedicated Services, *supra*. Rather, the Employer was in the early stages of training and recruiting potential drivers, and otherwise preparing for its future operations. Its only "employees" were trainees. It had not yet performed any transportation services to disabled passengers, which is its principal function. Drivers had not started performing what would be their normal bargaining unit work. Nor had the Employer hired any mechanics and utility workers to perform their normal functions, such as maintaining and repairing the Access-A-Ride vehicles. In short, the Employer's recognition of Local 707 occurred more than two weeks before normal operations commenced, and was premature on that basis as well. *See also* A.M.A. Leasing, 283 NLRB 1017, 1024 (1987). It therefore failed to adhere to

the Board's holdings that "employees may best decide their choice regarding representation once an employer is engaged in its normal business operations, that is, when employees are actually engaged in the work for which representation is sought," Elmhurst, *supra*, 345 NLRB at 1179.

Finally, it is doubtful that the Employer's recognition on September 12 was made "in good faith" as long required by the Board in recognition-bar cases. Smith's Food & Drug, *supra*, 320 NLRB at fn. 3. Although the Employer claims it did not know how many vehicles/routes it would get from NYC Transit (and therefore how many employees it would eventually need), the record simply does not support such a claim. Rather, the Employer's contract with NYC Transit and *Rapacioli's own projections* pursuant to the contract, clearly indicate that the Employer knew it would employ a much larger number of employees than the initial group of 22 driver-trainees. Especially given MV Transportation Inc.'s prior experience with Access-A-Ride contracts (including the Brooklyn job where Local 1181 represents MV Transportation, see pp. 4-5 *supra*), the Employer must have known it was recognizing Local 707 based on a very small initial group of trainees, compared to the rapidly-expanding group typical under such NYC Transit contracts. Thus, although evidence of *scienter* is not required to prove a Section 8(a)(2) violation in unfair labor practice cases,[24] a premature recognition in the representation context may fail to meet the "good faith" test required to bar an election where the employer knows the unit will greatly and imminently expand. *See also* New York Rehabilitation, *supra*, Reg. Dir.'s Order and DDE, slip op. at p.39 (employer knew, based on experience at prior location, how many employees they would need to operate

[24] International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731 (1961).

new facility; certification under premature election revoked); Hilton Hill Albany, *supra*, 270 NLRB at 1365 (employer "knew" it would rapidly expand workforce in first month).

Accordingly, I hereby conclude that the Employer's recognition of Local 707 on September 12 fails to meet the requirements for voluntary recognition as a bar to an election, especially the valid, previously-demonstrated majority support. In my view, failure to meet this important threshold requirement provides an independent basis for rejecting a recognition-bar claim, regardless of whether the parties also meet the Board's more recent Dana notice requirements. Although the Dana Board "presumed" majority support in that case, and therefore did not need to address the issue, nothing in Dana suggests that the Board would turn a blind eye to the initial invalidity of a recognition based on majority support among a group of employees that represented only a small fraction of the anticipated unit.

Employer failed to meet the specific notice requirements under *Dana Corp*.

In addition, as a separate basis for rejecting the parties' recognition-bar claim, the record shows that the notice-posting in the instant cases failed to meet the Dana requirements in several respects.

As discussed in detail above, the Board in Dana sought to protect the interest of dissenting employees by notifying them of any voluntary recognition and of their right to seek a secret-ballot election within 45 days. Thus, if parties to a voluntary recognition want a reasonable time period to negotiate a first collective bargaining agreement without disruption, they must first obtain a Dana notice from this agency. The Board specifically required *inter alia* that the Dana notice must identify the bargaining unit and the date of recognition; explain employees' right to seek an election; and be posted in conspicuous

places. Id., 443 and fn. 38. These requirements are not mere technicalities but, rather, important safeguards to assure that employees get adequate notice of their right to choose their own representative. In this regard, the conspicuous placement requirement is obviously meant to assure that employees have a chance to see the notice. It is also obvious that the notice must describe the bargaining unit so that employees in the relevant classifications are put on notice that the recognition affects *them*. To do otherwise would defeat the entire notification purpose of the Dana decision.

In the instant cases, the Region sent Dana notices to be posted at the Employer's facility on October 2, 2008. Based on information received from the relevant parties, the notice specifically stated that the Employer (as "MV Transit Inc.") had recognized Local 707 as the collective bargaining representative in the following unit of employees:

> **Included**: All full and regular part time drivers in Staten Island New York.
>
> **Excluding**: warehouse employees, mechanics, and similar maintenance employees, office clerical employees, managerial employees, guard, and supervisors as defined in the National Labor Relations Act.

The Notice further stated that the recognition was "based on evidence indicating that a majority of [unit] employees … desire its representation." The Notice then went on to explain employees' rights to an election, etc., as specified in Dana Corp.

At the representation case hearing, the witnesses flatly contradicted each other as to whether the Dana notice received from this Region was even posted. Generally, the Employer's witnesses stated that it was posted in the drivers' room of the LaSalle Street trailer on October 5 (a Sunday), whereas the RC Petitioner's witnesses stated that they never saw it. As described in detail above (pp.15-16), Rapacioli's testimony was full of memory lapses, contradictions and improbabilities, including that he could not even

remember initially whether he or his assistant, John Duncan, posted the Notice. Furthermore, even though Rapacioli testified that he opens all the mail at the Staten Island office, he could not explain how the office received the Notice on a Sunday, and did not recognize the "received" stamp on the Region's cover letter. By contrast, all four employee-witnesses (plus additional witnesses in the unfair labor practice cases) uniformly testified that, although they entered the drivers' room on a daily basis, they never saw the large notice with blue-colored portions. Under these circumstances, the record evidence falls short of demonstrating that the Dana notice was posted in conspicuous places for the required 45 days, if it was posted at all. *See also* AT&T Mobility, LLC, Reg. Dir.'s Decision and Direction of Election, Case No. 19-RD-3854 (Feb. 22, 2010)(no recognition bar because Dana notice not posted for entire 45-day period).

Moreover, even if the Dana notice was actually posted in conspicuous places for the entire 45-day period, it did not accurately describe the bargaining unit for which the Employer recognized Local 707, and which was eventually covered by the parties' collective bargaining agreement. Specifically, the unit was described as including only drivers, and expressly excluded mechanics and other classifications. Thus, any mechanics or utility workers who could have seen the Notice[25] would have absolutely no notice that the recognition involved them, or that they had any right to contest it. This inaccurate unit description therefore failed to meet the technical requirements of the Dana

25 The Employer started hiring mechanics and utility workers during the notice-posting period. See p. 18 *supra*.

case, and thereby defeated the purpose of notifying the relevant employees.[26] The clear intent of a Dana notice is to notify employees in the posted unit that, for a 45-day period, they are not bound to the employer and recognized union's agreement to forge a collective bargaining relationship. By omitting the mechanics and utility workers from the unit description, the notice denied those employees access to the rights provided by the Act and protected by the Board.

Finally, it should be noted that the Dana notice notified employees, in part, that the employer's recognition was "based on evidence indicating that a majority of [unit] employees desire its [Local 707's] representation." While the parties are not responsible for possibly inartful drafting of the notice language,[27] the fact remains that Local 707 asked the Region to notify employees of this "evidence"-based recognition, even though it had not in fact proven majority support in a representative complement of employees at the time. Given the imminent expansion of the recognized unit pursuant to the NYC Transit contract, as described above, both Local 707 and the Employer must have known that the 22 driver-trainees employed on September 12 were only a small fraction of the ultimate, larger complement of drivers, mechanics and utility workers. One could reasonably conclude that the parties abused the Board's processes by intentionally

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26 Local 1181 argues that the Dana notice was also defective, in that it did not correctly identify the Employer ("MV Transit Inc." versus "MV Public Transportation Inc."). It appears that the parties used those names somewhat interchangeably, and there is no contention that employees were confused about the identity of the employer. In any event, given my finding above that the unit description was defective, I need not decide this additional issue.

27 It is not entirely clear why the Board chose to insert that "majority support" language in the notice (Dana, 351 NLRB at 443), especially given its own doubts about the reliability of card-check recognition versus a Board-conducted election. Although the union's majority support was "presumed" valid in the Dana itself, the Board adopted the new notice requirements *precisely because* it wanted to give future employees the chance to contest a recognized union's majority support. Thus, the "majority support" language may misleadingly give employees the impression that the recognition was actually based on "evidence" of majority support, and that the Board has verified or approved this "evidence." Obviously,

inducing the Region to issue a Dana notice under false premises (i.e., when there was no valid evidence of majority support in a representative complement). In any event, it seems fairly clear that the Dana notice in this matter cannot bar an election in the instant representation cases, as it did not include mechanics and utility workers as part of the recognized unit.

In sum, I have found that the record in the instant cases fails to demonstrate that the October 2008, Dana notice was posted at all. I have further found that, even if the notice was posted, it did not describe the recognized bargaining unit as required in Dana. Finally, as a policy matter, I question whether the wording of the notice Dana had the effect of misleading employees to think that the voluntary recognition was actually based

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this language may have the unintended effect of discouraging employees from filing petitions where there was no majority support.

on Board-approved "evidence" of Local 707"s "majority support."

Therefore, based on all the foregoing, I conclude that the Employer's recognition in September 2008, was premature and void *ab initio*, and that the subsequent Dana notice in this case did not comply with important requirements for notifying employees of their rights. Accordingly, I conclude that the voluntary recognition does not bar employees from seeking a secret-ballot election to make their own choice regarding representation, as envisioned by Sections 7 and 9 of the Act.

Contract bar

Given that the Employer and Local 707 failed to meet the Dana requirements for recognition bar, the contract they executed in December 2008 does not create a contract bar. As the Board in Dana stated:

> [A] collective-bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless notice of recognition has been given and 45 days have passed without a valid petition being filed.

Id., 351 NLRB at 435. Stated differently, an agreement reached during the 45-day notice-posting period may bar an electoral challenge (for up to three years of the contract term) *only if* the parties created the 45-day period in the first place by properly requesting and posting the Dana notice and *if* no petitions are filed in the meantime. Id. at 441. In short, a valid contract-bar claim presupposes a valid recognition bar under Dana. That is reason alone to reject any claim of contract bar in the instant cases.

Furthermore, it is well established that, under contract bar doctrine, the contract in question must clearly by its terms encompass the employees involved in the petition. Houck Transport Co., 130 NLRB 270 (1961); Moore-McCormack Lines, 181 NLRB 510 (1970). As stated above, Dana expressly requires that both the written recognition

agreement and the Dana notice itself must describe the bargaining unit involved. Under Dana, then, it is doubtful whether a contract negotiated pursuant to a voluntary recognition in *certain* job classifications would bar an election in a unit containing *other* classifications. In the instant cases specifically, it is doubtful whether the parties' recognition agreement and Dana notice (limited to drivers, and expressly excluding mechanics and similar maintenance employees) could form a valid basis for a subsequent contract covering those excluded employees (mechanics and utility workers). Employees who were excluded under the Dana notice – and who therefore received no notice of their Dana rights – must not be limited, for up to three years, from seeking an election under a contract that ended up including them. The fact that the parties' December 2008, contract both included *and* excluded the mechanics and utility workers only further confuses whether the contract actually "covers" those employees for contract bar purposes.[28]

Time limit for representation petitions after an invalid recognition

The Employer contends that Local 1181's RC petition and John Russell's RD petition (filed in July 2009 and October 2009, respectively) were untimely since they were filed more than six months after the September 2008, recognition and the December 2008, contract execution. The Employer cites a series of construction-industry representation cases (such as Pontiac Ceiling & Partition Co., 337 NLRB 120 (2001))

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28 Moreover, the contract's union security clause requires employees to start paying union dues and fees "not later than the 31st day following the employee's completion of training, or the contract ratification date, whichever is later." (Jt. Ex. 1, Section 3.2) For new employees hired after the contract, their training completion date may be later than the contract ratification date, so the contract might afford the statutory 30-day grace period. However, for incumbent non-member workers, whose training had already been completed before the contract, the start date of their 30-day period is tied to a "ratification" date not specified in the contract itself. Assuming that any contract-ratification procedure would predate the contract's execution date, it creates a union security obligation which is both retroactive and unascertainable from the contract's face. The contract therefore does not notify those employees when their grace period starts and ends, and may be defective for contract-bar purposes. See Standard Molding Corp. 137 NLRB 1515 (1962).

wherein rival petitions filed more than six months after the incumbent union achieved 9(a) status were dismissed, and Casale Industries Inc., 311 NLRB 951 (1993), which in turn cited Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960), an unfair labor practice case.[29]

However, all the cases cited by the Employer pre-dated the Board's decision in Dana Corp., and do not take into account how Dana has changed the recognition-bar landscape. Dana created a new set of prerequisites for a voluntary recognition to bar a another petition, including the new notice-posting requirement. Simply put, a voluntary recognition which did *not* properly follow the Dana requirements does *not* bar a subsequent petition from proceeding to an election. Thus, as I have concluded that the Employer's recognition of Local 707 did not meet the Dana requirements, *no bar quality ever attached*. Therefore, for representation cases purposes, there was no precipitating event against which to measure the passing of time. I therefore reject the Employer's argument that the Board would not allow employees their statutory right to a Board-conducted election (potentially through the first three years of the contract) when the parties did not meet its Dana requirements for "recognition bar" in the first place.

In sum, I have concluded that the Employer's recognition of Local 707 in September 2008, does not bar an election on two grounds: (1) that the recognition occurred too early in the Employer's expansion period, when no representative complement existed against which Local 707's "majority support" could be measured,

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29 The issue of whether the related unfair labor practices were filed within the Section 10(b) limitation period for unfair labor practice cases was litigated in those cases. In essence, Counsel for the General Counsel cited Dedicated Services, *supra*, for the proposition that in expanding units, the 10(b) period does not start to run until the Employer's subsequent expansion gives clear notice of the violation, i.e. that the initial recognition was based on a non-representative complement. However, Section 10(b) does not apply to representation cases, and that specific issue will not be addressed herein.

and (2) that the specific notice-posting requirements of Dana were not met. I have also concluded that the parties' 2008- 2013 collective bargaining agreement does not bar an election, under Dana's "parallel modification" of the contract bar doctrine.

Accordingly, I will direct an election, at a time to be determined, in the existing unit of drivers, mechanics and utility workers employed by the Employer under its NYC Transit contract in Staten Island. In addition, the Employer's motion to dismiss the petitions is hereby denied.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding,[30] the undersigned finds and concludes as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that MV Public Transportation, Inc. is a domestic corporation with its principal office and place of business located at 1957 Richmond Terrace, Staten Island, New York, where it is engaged in providing paratransit transportation services. During the past year, which period represents its annual operations generally, the Employer derived gross revenues in excess of $250,000, and also purchased and received at its Staten Island, New York, facility goods and materials

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30 The undersigned amends the transcript *sua sponte*, as indicated in Appendix A appended to this Decision. An "Order Receiving Exhibits, Setting Due Date for Briefs, and Closing the Record," issued by the Hearing Officer on March 12, 2010, is hereby entered into the record as Board Exhibit 9, and attached to this Decision as Appendix B.

valued in excess of $50,000 directly from suppliers located outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that Local 1181-1061, Amalgamated Transit Union, AFL-CIO, and Local 707, International Brotherhood of Teamsters are both labor organizations as defined in Section 2(5) of the Act. Both labor organizations claim to represent certain employees of the Employer.

4. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I hereby find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time drivers, mechanics and utility workers located and employed out of the Employer's 1957 Richmond Terrace, Staten Island, New York facility, and in connection with the Employer's Staten Island-based operations, but excluding all warehouse employees, dispatchers, quality control employees, office clerical employees, managerial employees guards and supervisors as defined in Section 2(11) the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by Local 1181-1061, Amalgamated Transit Union, AFL-CIO, or by Local 707, International Brotherhood of

Teamsters, or by neither labor organization. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with

them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. If I determine that the Petitioner has submitted an adequate showing of interest in the enlarged unit found appropriate herein, I will then make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **May 27, 2010.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nrlb.gov,[31] by mail, or by facsimile transmission at (718) 330-7579. The burden of establishing the timely filing and receipt of the list will continue to be on the sending party.

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31 To file the eligibility list electronically, go to www.nrlb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least three (3) working days prior to12:01 of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20507-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **June 3, 2010**. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[32] but may **not** be filed by facsimile.

[32] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

Dated: May 20, 2010.

s/s"{Alvin Blyer}"
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

APPENDIX A – AMENDMENTS TO THE TRANSCRIPT

The transcript is hereby amended as follows:

Page 5, line 16: "RD" Petitioner, rather than "RC".

Page 24, line 16: "Tor's" recollection, rather than "towards".

Page 133, line 5: "d/b/a" (doing business as) rather than "DDA".

Page 199, lines 6 and 24: "MR. BROOK" rather than "MR. CHRISTENSEN".

Page 226, line 1: "raided" rather than "rated".

Page 227, line 16: "Pihl" rather than "Peal".